IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-758

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

STATE HUMAN RIGHTS APPEAL BOARD, et al.,
Respondents.

BRIEF AMICI CURIAE ON BEHALF OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS AND I.U.E. LOCAL 1581 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WINN NEWMAN
General Counsel
International Union of Electrical,
Radio and Machine Workers,
AFL-CIO-CLC
1126 Sixteenth Street, N.W.
Washington, D.C. 20036

MICHAEL B. TRISTER
SOBOL & TRISTER
910 Seventeenth Street, N.W.
Washington, D.C. 20006

December, 1978 *Attorneys for Amici Curiae*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-758

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

STATE HUMAN RIGHTS APPEAL BOARD, et al.,
Respondents.

BRIEF AMICI CURIAE ON BEHALF OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS AND I.U.E. LOCAL 1581 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereinafter "I.U.E.") and I.U.E. Local 1581 file this Brief Amici Curiae in opposition to the Petition for Writ of Certiorari filed by Westinghouse Electric Corporation in this case. The Brief is filed, pursuant to Rule 42(1) of the Rules of this Court, with the consent of the parties.

INTEREST OF AMICI

I.U.E. and its affiliated locals represent more than 22,000 hourly and salaried workers at forty-one plants operated by petitioner Westinghouse Electric Corporation, including three plants in New York State. I.U.E. Local 1581 is the collective bargaining agent at Westinghouse's Buffalo, New York facility, one of the plants involved in this case.

I.U.E. has, pursuant to its statutory duty of fair representation, long opposed unlawful discrimination in the work place. Through collective bargaining, grievances, arbitration and litigation, I.U.E. has systematically challenged practices that disadvantage women workers, including the denial of disability benefits to pregnant workers. I.U.E. appeared as *amicus curiae* in this Court in *Cleveland Board of Education v. La Fleur,* 414 U.S. 632 (1974), and *Geduldig v. Aiello,* 417 U.S. 484 (1974), cases challenging the discriminatory treatment of pregnant workers under the Fourteenth Amendment. I.U.E. was a plaintiff in *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976), a case brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, to eliminate pregnancy based discrimination. It has filed a similar suit against Westinghouse, which was recently remanded to the district court by the Third Circuit to consider pregnancy related issues under Title VII. See *Eberts v. Westinghouse Electric Corp.,* 581 F.2d 357 (3d Cir. 1978).

At the state level, I.U.E. locals have filed numerous charges of pregnancy based discrimination under state fair employment practice laws. In fact, one of the complaints in this case was filed with the assistance of I.U.E. Local 1581 and was prosecuted before the Division of Human Rights by attorneys employed by the I.U.E. Petition for Writ of Certiorari (hereinafter "Petition") at A33-34. I.U.E. has similar cases pending under state laws in Wisconsin, Pennsylvania and New York. Finally, the I.U.E. and several of its locals appeared as *amici curiae* in *Quaker Oats Co. v. Cedar Rapids Human Rights Commission,* 268 N.W. 2d 862 (Iowa 1978), to urge the Iowa Supreme Court to bar

pregnancy based discrimination under that state's human rights law.

Despite the recent amendment to the Civil Rights Act prohibiting pregnancy based discrimination, Pub. L. 95-555, state fair employment agencies remain an essential part of the national enforcement machinery to eliminate sex based discrimination. Adoption of either of the preemption arguments urged by Westinghouse in its Petition would therefore seriously undermine the anti-discrimination efforts of the I.U.E. and its affiliated locals.

ARGUMENT

The Petition for Writ of Certiorari should not be granted because the ERISA preemption issue raised by the petition is not squarely or clearly presented by the record and because resolution of this issue is unnecessary at the present time.

I.

The Issues Raised in the Petition Are Not Squarely or Clearly Presented in This Case.

The principal question presented in the Petition is whether section 514(a) of the Employee Retirement Income Security Act (ERISA) preempts state fair employment laws that prohibit discrimination in health and welfare plans against pregnant employees. For several reasons, that issue is not squarely or clearly presented in this case.

1. The acts of discrimination against the eight individual complainants in this case occurred during 1971, 1972, 1973 and 1974. Petition for Writ of Certiorari at

A8, A17, A24-A26, A34-A35. Section 514(a) of ERISA, on which petitioner's preemption argument relies, did not take effect until January 1, 1975. 29 U.S.C. § 1144 (a). The Act provides that the preemption provision "shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. § 1144(b)(1). Thus, it is not even arguable that ERISA preempts the orders of the New York State Division of Human Rights granting relief to the eight individual complainants in this case.

2. Although the Division's orders granted prospective relief as to other employees at petitioner's plants, Petition at A13, A21, A30, A41, the effect of these orders was vitiated by a subsequent decision of the New York Court of Appeals. In *Board of Education of Union Free School District No. 2, East Williston, Town of North Hempstead v. New York State Division of Human Rights,* 44 N.Y. 2d 902, 407 N.Y. S.2d 636 (1978), the Court of Appeals ruled that the Division of Human Rights may not enforce a prior affirmative order on behalf of individuals not named as complainants in the original proceeding. Instead, such persons must initiate their own proceedings by filing charges of discrimination with the Division within the statutory limitations period. As a result of *East Williston,* the prospective orders of the Board challenged here are of no effect.

3. Apart from the invalidity of the prospective orders in this case, the ERISA preemption question presented in the Petition is no longer of any significance in New York because of a subsequent change in New York insurance laws. At the time that these cases were decided by the Division, the New

York Worker's Compensation Law (Disability Benefits Law) specifically excluded pregnancy from the law's mandatory coverage. See *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board,* 41 N.Y. 2d 84 (1976). However, effective August 3, 1977, the Worker's Compensation Law was amended to require employers to provide at least eight weeks of coverage for disabilities resulting from normal pregnancies and additional coverage where there have been complications. L. 1977, c. 675 § 29, amending Worker's Compensation Law § 205(3).

Thus, quite apart from the orders of the Division under the New York Human Rights Law, Westinghouse has been required since August 3, 1977 to provide at least eight weeks of disability benefits for its pregnant employees in New York.[1] Since state insurance laws, such as the Worker's Compensation Law, are expressly excepted from the ERISA preemption provision, 29 U.S.C. § 1144(b)(2)(A), resolution of the issue presented in the Petition would have no effect on the prospective obligations of Westinghouse and other employers in New York State.

In sum, the orders challenged here clearly are not preempted by ERISA with respect to the individual complainants. With respect to the prospective relief

---

[1] The New York Court of Appeals held in *Brooklyn Union Gas* that the Human Rights Law takes precedence over any limitation in the Worker's Compensation Law. 41 N.Y. 2d at 88. Thus, an employer might still be obligated by the Human Relations Law to pay more than the minimum mandated by the Disability Benefits Law. It is extremely doubtful whether many such cases will arise, however, since the normal period of disability for pregnancy does not exceed eight weeks, and extra benefits for cases involving complications are mandated by the DBL.

ordered by the Division, the preemption question has been mooted both by a subsequent decision of the New York Court of Appeals and by the 1977 amendment to the New York Disability Benefits Law. Because of these factors, certiorari is not appropriate in this case.

II

Apart from Factors Peculiar To This Case, the Question Whether ERISA Preempts State Anti-discrimination Laws Should Not Now Be Reviewed.

Apart from the foregoing factors peculiar to this case, there are a number of reasons why the question whether ERISA preempts state anti-discrimination laws should not be decided at this time.

1. There is no significant conflict among the lower courts with respect to the ERISA preemption question. Each of the other state intermediate appellate courts that has decided the question has agreed with the court below in this case. *Goodyear Tire & Rubber Co. v. Department of Industry, Labor and Human Relations,*—N.W.2d—(Wis. Ct. of App. Nov. 22, 1978); *Gast v. State of Oregon,* 585 P.2d 12 (Or. Ct. of App. 1978); *Liberty Mutual Insurance Co. v. State Division of Human Rights,* 402 N.Y.S. 2d 218 (2d Dept. 1978). The issue has not yet even been decided by the highest court of any state, nor by any United States Court of Appeals.[2]

[2] Most of the ERISA cases cited by Westinghouse differ significantly from this case. Under section 514(d) of ERISA, nothing in ERISA modifies or supersedes any provision of any other federal law. 29 U.S.C. § 1144(d). Title VII of the Civil Rights Act of 1964, which is a federal law within the meaning of section 514(d),

2. Contrary to petitioner's suggestion, Petition at 17 n. 11, there is no likelihood of "massive backpay awards" under state law. Remedies under state FEP laws are generally limited to individual complainants, who must meet rigid statutory requirements for filing discrimination complaints. 5 Newberg, Class Actions 1267 (1st ed. 1977). Furthermore, a number of states, like New York, require coverage of pregnancy under their disability insurance laws, see Cal. Unemp. Ins. Code § 2626.2 (West Supp. I 1978); Haw. Rev. Stat. §§ 392-3, 392-21; N.J. Stat. Ann. § 43-21-29; R.I. Gen. Laws, § 28-41-8, which are not preempted by ERISA. 29 U.S.C. § 1144(b)(2)(A).

3. As noted earlier, on October 31, 1978, Congress amended Title VII of the Civil Rights Act to prohibit all forms of pregnancy based discrimination. Under this statute, employers such as Westinghouse have 180 days to provide full and equal benefits for pregnancy related disabilities. Thus, after this date, there will be no possibility of conflict between federal law and state antidiscrimination laws that prohibit pregnancy discrimination. Yet, the ERISA preemption argument urged by Petitioner would bar the use of state enforcement machinery after the effective date of Pub. L.

---

in turn preserves state fair employment laws such as the New York Human Rights Law. 42 U.S.C. § 2000e-7. A major question presented by this case, therefore, is whether § 514(d) preserves all of Title VII, including its retention of state law, and if so, whether section 514(a), the ERISA preemption provision, overrides section 514(d). In contrast, most of the ERISA preemption cases cited by petitioner do not involve any question under section 514(d).

95-555, in contradiction to the policy expressed in Section 708 of Title VII, 42 U.S.C. § 2000-e7.[3]

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

WINN NEWMAN
General Counsel
International Union of Electrical,
Radio and Machine Workers,
AFL-CIO-CLC
1126 Sixteenth Street, N.W.
Washington, D.C. 20036

MICHAEL B. TRISTER
SOBOL & TRISTER
910 Seventeenth Street, N.W.
Washington, D.C. 20006

Attorneys for Amici Curiae

December, 1978

---

[3] Petitioner offers no specific reasons why this Court should decide the second question presented in its Petition, whether Title VII preempts state FEP laws that prohibit sex discrimination in employee benefit plans. Of course, Title VII expressly preserves state laws. 42 U.S.C. § 2000e-7; and see 42 U.S.C. § 2000h-4. As this Court noted in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974), "Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes."